

1 The Honorable Richard A. Jones
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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT SEATTLE

11 DEBORAH FRAME-WILSON, CHRISTIAN
12 SABOL, SAMANTHIA RUSSELL, ARTHUR
13 SCHAREIN, LIONEL KEROS, NATHAN
14 CHANEY, CHRIS GULLEY, SHERYL
15 TAYLOR-HOLLY, ANTHONY COURTNEY,
16 DAVE WESTROPE, STACY DUTILL,
17 SARAH ARRINGTON, MARY ELLIOT,
18 HEATHER GEESEY, STEVE MORTILLARO,
19 CHAUNDA LEWIS, ADRIEN HENNEN,
20 GLENDA R. HILL, GAIL MURPHY,
21 PHYLLIS HUSTER, and GERRY
22 KOCHENDORFER, on behalf of themselves
23 and all others similarly situated,

24 Plaintiffs,

25 v.

26 AMAZON.COM, INC., a Delaware
27 corporation,

28 Defendant.

Case No. 2:20-cv-00424-RAJ

PLAINTIFFS' MOTION TO COMPEL
26(F) CONFERENCE UNDER FEDERAL
RULE OF CIVIL PROCEDURE 37

NOTED FOR MOTION CALENDAR:
April 15, 2022

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I. INTRODUCTION AND BACKGROUND

Pursuant to Federal Rule of Civil Procedure 37, Plaintiffs¹ respectfully move to compel Defendant Amazon’s participation in a conference pursuant to Federal Rule of Civil Procedure 26(f), to allow this case, which has now been pending for over two years—and has survived Amazon’s motion to dismiss—to proceed into discovery.

This Action was originally filed on March 19, 2020, alleging that Amazon uses its market power to suppress competition from its own third-party sellers, who also sell on other platforms including Wal-Mart or eBay, by enforcing price restraints whereby Amazon's third-party sellers agree not to sell their products on other websites for less than they do on Amazon's own platform. This practice has already come under threat from antitrust regulators in Britain and Germany, as well as the United States Federal Trade Commission, and is a violation of the Sherman Act.

At the time the Complaint was filed, the parties agreed to defer setting the usual initial case deadlines, including the 26(f) conference, until after disposition of Amazon’s anticipated motion to dismiss, Dkt. 5 at 2, and this Court thereafter suspended those deadlines pending its decision, Dkt. Entry, July 14, 2020 (suspending initial case deadlines “pending the Court’s ruling on Defendant’s 11 MOTION to Dismiss for Failure to State a Claim”). But after careful consideration of Amazon’s motion to dismiss the Amended Complaint, on March 11, 2022, this Court issued a decision largely denying Amazon’s motion, and holding that Plaintiffs adequately pleaded the relevant market, anticompetitive conduct, and antitrust injury. Dkt. 48 at 18, 20-22.

In light of the Court’s decision that Plaintiffs’ case may proceed, Plaintiffs’ counsel met and conferred on March 24 on a Microsoft Teams video call with counsel for Amazon to discuss scheduling a 26(f) conference, and beginning discovery in this long-pending case. Declaration of Steve W. Berman In Support of Plaintiffs’ Motion To Compel 26(f) Conference Under Federal Rule Of Civil Procedure 37, ¶ 1 (filed herewith).

¹ “Plaintiffs” are Deborah Frame-Wilson, Christian Sabol, Samanthia Russell, Arthur Scharein, Lionel Keros, Nathan Chaney, Chris Gulley, Sheryl Taylor-Holly, Anthony Courtney, Dave Westrope, Stacy Dutill, Sarah Arrington, Mary Elliot, Heather Geesey, Steve Mortillaro, Chaunda Lewis, Adrien Hennen, Glenda R. Hill, Gail Murphy, Phyllis Huster, and Gerry Kochendorfer.

On the call, Amazon responded that Plaintiffs' request to schedule a 26(f) conference was "premature" because Amazon planned to file a motion for reconsideration of the Court's order. But, as Plaintiffs' counsel pointed out on the call, the local rules expressly provide that motions for reconsideration do not stay discovery. *Id.*; *see* Local Civil Rule 7(h)(2) ("The pendency of a motion for reconsideration *shall not stay discovery.*" (emphasis added)). Amazon's refusal to engage in a 26(f) conference amounts to nothing more than a self-imposed stay of discovery contrary to the Rules—and Amazon might be one of the largest corporations in the world, but the rules apply to it as they would to anyone else.

Permitting Amazon to further delay discovery, even after this Court has denied Amazon’s motion to dismiss, deprives Plaintiffs of the ability to prosecute their case, and unnecessarily extends the schedule for this Action. Plaintiffs respectfully move the Court to order that discovery may commence, and to compel Defendant Amazon to participate in a Rule 26(f) conference within one week of the Court’s issuing an order compelling such participation.

II. ARGUMENT

More than two years after the initial filing of this Action on March 11, 2022, this Court ruled that Plaintiffs’ allegations of anticompetitive actions by Amazon survived Amazon’s motion to dismiss. This Court issued a decision holding that Plaintiffs plausibly pleaded the relevant market (having pleaded both a U.S. retail ecommerce market, and a series of alternative U.S. ecommerce retail submarkets); that Plaintiffs plausibly pleaded Amazon’s anticompetitive conduct (and that Amazon’s arguments about purported procompetitive justifications for its pricing policies are not appropriate for the motion to dismiss stage); and that Plaintiffs plausibly pleaded antitrust injury (in the form of increased retail prices to consumers). Dkt. 48 at 18, 20-22.

Plaintiffs are prepared to prosecute this action, and discovery should proceed promptly. Amazon’s refusal to schedule and participate in a Rule 26(f) conference is inconsistent with the Federal Rules of Civil Procedure, the practice in this district, and the expectations of the Court and the Parties. *See generally* Fed. R. Civ. P. 26; Local Rule 7(h)(2); Dkts. 5, 9 & Dkt. Entry, July 20, 2020.

1 There can be no dispute about the basic obligations that Rule 26(f) imposes upon both
 2 parties in a litigation. Rule 26(f) provides that the parties must conduct a 26(f) conference “as
 3 soon as practical,” Fed. R. Civ. P. 26(f)(1), and that the attorneys on both sides are “jointly
 4 responsible for arranging the conference,” and negotiating a discovery plan, Fed. R. Civ. P.
 5 26(f)(2). Indeed, under Federal Rule of Civil Procedure 37, a party’s failure to participate in
 6 good faith in developing the discovery plan for submission to the court is grounds for an order to
 7 pay expenses, including attorneys’ fees. Fed. R. Civ. P. 37(f).

8 Now that the Court has ruled that Plaintiffs’ allegations should not be dismissed, it is time
 9 to proceed with discovery. Amazon cannot be permitted to unilaterally stay discovery by
 10 refusing to participate in the 26(f) conference required by the Federal Rules. Indeed, courts in
 11 this district have granted motions to compel participation in such conferences where one party
 12 refuses to participate, noting that “gamesmanship surrounding discovery conferences and other
 13 actions that prevent [a] matter from moving forward will not be tolerated.” *See Secure*
 14 *Channels, Inc. v. Coleridge*, 2017 WL 3026059, at *1 (W.D. Wash. May 1, 2017) (setting Rule
 15 26(f) conference deadline); *see also Panyanouvong v. Aphay*, 2014 WL 2986507, at *7-8 (W.D.
 16 Wash. July 1, 2014) (compelling attendance at Rule 26(f) conference and awarding attorneys’
 17 fees); *ING Bank, fsb v. Fazah*, 2009 WL 3824751, at *3, 5 (E.D. Cal. Nov. 16, 2009), *report and*
 18 *recommendation adopted*, 2009 WL 4507722 (E.D. Cal. Dec. 3, 2009) (compelling participation
 19 in Rule 26(f) conference).

20 It is no excuse that Amazon has elected to file a motion asking this Court to reconsider its
 21 decision. Dkt. No. 51. Setting to the side the fact that Amazon’s motion for reconsideration
 22 does not meet any of the standards for such a motion as set forth in this district’s Local Civil
 23 Rules, even for a meritorious motion, Local Rule 7(h)(2) expressly provides that “[t]he pendency
 24 of a motion for reconsideration *shall not stay discovery* or any other procedure.” (emphasis
 25 added). Amazon’s refusal to participate in a 26(f) conference therefore violates the rules of this
 26 Court, and impedes Plaintiffs’ proper prosecution of their claims.

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CERTIFICATE OF SERVICE

I hereby certify that on March 31, 2022, a true and correct copy of the foregoing was filed electronically by CM/ECF, which caused notice to be sent to all counsel of record.

/s/ Steve W. Berman